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VIA ECFS
Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Petition of AT&T Services, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain Rules for Switched Access Services and Toll Free Database Dip Charges, WC Docket No. 16-363; Connect America Fund, WC Docket 10-90

Dear Ms. Dortch:

On August 2, 2017, James Groft, CEO of James Valley Cooperative Telephone Company ("James Valley") and Northern Valley Communications, L.L.C. ("Northern Valley"), and the undersigned held three separate meetings to discuss the ex parte filings made by AT&T on May 9, 2017 and June 2, 2017, and South Dakota Network, LLC ("SDN"), on June 6, 2017, July 12, 2017, and July 13, 2017 regarding AT&T's Petition for Forbearance in the above-captioned docket. The meetings were held with (1) Dr. Jay Schwarz, Wireline Advisor to Chairman Pai; (2) Commissioner Michael O'Rielly and his Legal Advisor Amy Bender; and (3) with Wireline Competition Bureau and Pricing Policy Division staff members, including Gil Strobel, Joseph Price, Edward Krachmer, and Gregory Capobianco meeting us in person, and Lisa Hone and Pamela Arluk joining by teleconference. The purpose of the meeting was for James Valley and Northern Valley to clarify misleading information and highlight important factual omissions in AT&T and SDN's filings.[1] The presentation attached as **Exhibit A** was used during the discussion and the summary below reflects the key points.

Two factual omissions are particularly relevant to understanding the AT&T and SDN ex partes in the appropriate light. First, it has recently been disclosed publicly that in September 2014 SDN entered into a negotiated, off-tariff, and unfiled contract with AT&T to provide AT&T with switching and transport services on traffic terminating to Northern Valley's

[1] James Valley and Northern Valley have previously participated in this docket through the filing of a Joint Motion for Summary Denial and Opposition to the Petition of AT&T Services, Inc. for Forbearance Pursuant to 47 U.S.C. § 160(c) filed on December 2, 2016. James Valley and Northern Valley will not repeat those arguments here, but note that their Motion for Summary Denial should be promptly granted because AT&T lacks standing to request certain relief and because AT&T's Petition was not complete as filed.

exchanges.[2] Second, a federal district court recently granted summary judgment in favor of Northern Valley for AT&T's decision to ignore Northern Valley's deemed lawful tariff and the FCC's existing rules while utilizing Northern Valley's tariffed access services without compensating Northern Valley at the rates contained in its tariff.[3]

James Valley and Northern Valley urged the Commission to resolve AT&T's Petition for Forbearance on the merits, avoiding any potential for it to be "deemed granted" by a failure to meet the statutory deadlines. James Valley and Northern Valley also urged the Commission to deny AT&T's Petition because the relief that AT&T seeks goes well beyond the appropriate scope of a petition for forbearance and, insofar as the Commission only granted forbearance (as compared to imposing new rules—the relief AT&T is actually seeking), it would create more disputes and chaos in the industry, rather than bring certainty to the parties. Instead of the current forbearance proceeding, James Valley and Northern Valley encouraged the Commission to address AT&T's request for new law through a notice-and-comment rulemaking. Finally, to the extent it grants any relief, James Valley and Northern Valley respectfully requested the Commission refuse to sanction AT&T's complete disregard for the Commission's access rules in its practice of self-help withholding.

During the meetings, we discussed specific statements and representations made by AT&T and SDN. These points are also outlined below.

I. AT&T'S MAY 9, 2017 AND JUNE 2, 2017 EX PARTES

AT&T's June 2, 2017 ex parte filing includes a PowerPoint presentation originally used during its May 9, 2017 meeting.[4] The PowerPoint includes numerous statements that are either

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[2] *N. Valley Commc'ns, L.L.C. v. AT&T Corp.*, Opinion and Order Granting in Part and Denying in Part Cross-Motions for Summary Judgment, No. 1:14-CV-01018-RAL, 2017 WL 1167210, *16 (D.S.D. Mar. 28, 2017) ("AT & T argues that it is not responsible for any transport charges after September 2014 between Sioux Falls and Groton because SDN, rather than NVC, was providing that transport **pursuant to a negotiated agreement** with AT & T.") (emphasis added); *id.* ("Despite AT & T's arguments to the contrary, it is a material issue whether SDN had the ability to enter into an agreement with AT & T or had a binding agreement with NVC such that it could not."). The Court's Order is attached as **Exhibit B.** In addition to tandem switching, SDN purports to provide transport from Sioux Falls to Groton on AT&T's Northern Valley-bound traffic, while, in reality, that traffic travels on circuits that Northern Valley controls, and has always controlled, through an ongoing lease. SDN's attempted conversion of Northern Valley's leased circuits is the subject of litigation in state court in South Dakota that is scheduled for trial in March 2018.

[3] *Id.*

[4] *Petition of AT&T Services, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain Rules for Switched Access Services and Toll Free Database Dip Charges*, AT&T Services, Inc. Ex Parte Presentation, WC Docket No. 16-363 (June 2, 2017) (presentation attached).

intentionally misleading or, at best, omit material information that leaves the statements ambiguous and subject to misinterpretation. Notably, in each instance, despite having the burden of proof and persuasion, AT&T makes these statements while failing to provide any evidentiary support. Without evidence to support AT&T's assertions, the Commission's rules make clear that AT&T's Petition for Forbearance must be denied.[5]

Northern Valley addresses the most problematic of AT&T's statements.

- **AT&T's Unsupported Assertion (p. 5): "Access stimulators continue to rely on inflated transport charges to replace revenues reduced by the 2011 reforms."**

    - **James Valley/Northern Valley Response:** This statement is problematic for two independent reasons. First, it is logically inconsistent to say that a carrier "continues to rely" on transport revenues "to replace" lost revenues. If a carrier is *continuing* to rely on a preexisting source of revenue, those very same revenues cannot then be *replacing* revenues that have been reduced as a result of the FCC's phase down of end office rate elements in the 2011 *Connect America Fund Order*. AT&T's statement is both unsupported and illogical.

      Separately, AT&T's representation that transport charges are "inflated" is unsupported and untrue. For CLECs, like Northern Valley, the rates are not "inflated" because the rates are set pursuant to the Commission's benchmarking regime, which it adopted pursuant to notice and comment rulemaking, and which declared the rates just and reasonable. Importantly, there is not a scintilla of evidence in the record to support AT&T's conclusion that these rates are inflated (i.e., unjust and unreasonable).

      Up to this point, the record in this proceeding has been completely devoid of any discussion of the revenues and profits that AT&T received and continues to receive from delivering calls to the service providers that make conference calling and information programming available to millions of consumers across the country. The discussion, if had, would highlight significant revenues that AT&T receives from voluntarily carrying this traffic on behalf of other interexchange carriers on a wholesale basis. Indeed, when AT&T began withholding from Northern Valley in March 2013, it also began carrying additional (and substantial) volumes of traffic for other carriers, such as T-Mobile. AT&T then used the increase in traffic volumes as a smoke screen, claiming that it needed to "investigate" why the traffic volumes had increased and was therefore going to withhold payment during said investigation. Ultimately, Northern Valley pursued

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[5] *See In re Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Commc'ns Act of 1934, As Amended*, Report and Order, 24 FCC Rcd. 9543, ¶¶ 20-21 (2009).

(and continues to pursue) payment against AT&T through costly and prolonged litigation in the federal courts.

In that federal litigation, AT&T was obligated to finally turn over revenue and cost data, which allowed Northern Valley to conduct an in-depth analysis of how Northern Valley's access stimulation affects AT&T's bottom line. After years of unsupported complaints, Northern Valley was finally able to confirm what it had suspected all along – AT&T makes a great deal of money because of access stimulation. According to the analysis performed by Northern Valley's experts in *Northern Valley v. AT&T*, for the period of March 2013 (when AT&T stopped paying Northern Valley) to June 2016 (when the analysis was performed), AT&T collected $50 million for Northern Valley-bound traffic, producing a net profit of $30 million for AT&T.[6] AT&T generated $8.2 million in revenue from wholesale traffic alone. If AT&T paid its bill, rather than engage in self-help withholding, it would have paid Northern Valley approximately $9 million during the same time period. Put differently, AT&T was just shy of being able to pay its switched access bill to Northern Valley from its wholesale traffic revenue alone. Thus, when AT&T complains that the rates are "inflated" the Commission should reject this argument. AT&T makes millions of dollars each year delivering traffic to the conference calling and chat lines services it complains about. It simply wants the Commission to inflate its profits even more. But that is not what a forbearance petition is about.

- **AT&T Unsupported Assertion (p. 8): "Terminating End Office charges have been reformed, while the proportion of Transport and 8YY Database charges are trending higher."**

    - **James Valley/Northern Valley Response:** AT&T's representation that transport charges are "trending higher" is misleading. AT&T's presentation does not disclose its total expenditure for access charges or its expenditure for transport-specific elements. Therefore, there is no support for the assertion that transport rates are trending higher or that AT&T is paying more in transport today than it did prior to the FCC's 2011 reforms.

      Of course, as the Commission phases out terminating end office charges, there can be little doubt that transport charges will take up a larger section of the total access pie. That's a simple mathematical truism. But, insofar as AT&T's statement may be read to imply that its total cost for transport has been "trending higher," it is unsupported.

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[6] *See N. Valley Commc'ns, LLC v. AT&T Corp.*, No. 1:14-CV-01018-RAL, Motion Hearing Transcript, at 44:17-49:20 (Jan. 23, 2017), attached as **Exhibit C.**

- **AT&T Unsupported Assertion (p. 10): "Access stimulation: Continues to be a significant issue"**

    - **James Valley/Northern Valley Response:** This slide appears to reflect a representation by AT&T that traffic stimulation in September 2016 accounted for 80% of its "terminating switched usage expense." However, in light of AT&T's long-documented pattern of not paying its bills, this statement simply cannot be taken at face value. In evaluating AT&T's Petition for Forbearance, the Commission should give no weight to AT&T's representations that are made without providing evidence. The recent summary judgment ruling (**Exhibit B**) in *Northern Valley v. AT&T* concluded that AT&T has unlawfully withheld payments due under Northern Valley's FCC Tariff. Despite this ruling, AT&T continues to engage in such withholding. Therefore, at a minimum, the Commission would need to understand whether Northern Valley's unpaid access charges are included in AT&T's chart even though the bills have not been paid.

      AT&T has also not provided sufficient information to assess its representation that the "% of spending is considerably higher when including carriers that deny traffic pumping." This footnote highlights AT&T's failure to explain which traffic it has identified as "Traffic Stimulation" for purposes of its graph.

- **AT&T Unsupported Assertion (p. 13): "Mileage pumping: If direct connects are not allowed, mileage charges are increased"**

    - **James Valley/Northern Valley Response:** Northern Valley is particularly concerned about the misrepresentations contained on page 13 of AT&T's PowerPoint presentation. As an initial matter, the picture contained on this graph depicts the path to Northern Valley's premises in Redfield, South Dakota. The rest of AT&T's statements on this page do not accurately reflect the situation with Northern Valley.

      First, AT&T's assertion that if direct connections are not allowed, "mileage charges are increased," is false. Northern Valley is an affiliate of James Valley, a founding member of South Dakota Network, LLC. Consistent with long-standing SDN policy, and SDN's current operating agreement, Northern Valley exchanges all TDM access traffic at the SDN tandem switch in Sioux Falls and then Northern Valley provides transport for the traffic from Sioux Falls to Groton, South Dakota. This was the manner in which Northern Valley provided its services long before it began providing service to conference calling customers and well before the FCC's 2011 *Connect America Fund Order*. Thus, Northern Valley has done nothing to increase its mileage charges as AT&T erroneously asserts.

Further, AT&T's suggestion that it has a right to a direct interconnection through a petition for forbearance is fundamentally flawed. Congress decided long ago that ILECs are required to provide direct interconnections, while CLECs have no such obligation. *Compare* 47 U.S.C. §§ 251(a)(1) and 251(c)(2)(B); *see also In re Implementation of the Local Competition Provisions in the Telecomms. Act of 1996*, 11 FCC Rcd. 15499, 16171 (1996) ("competitive telecommunications carriers that have the obligation to interconnect with requesting carriers may choose, based upon their characteristics, whether to allow direct or indirect interconnection."). Moreover, this Commission has consistently and clearly held that a CLEC's obligation to obtain the full benchmarked rate is to provide tandem-switched transport, not direct connections. *See, e.g.,* 47 C.F.R. § 61.26(a)(3)(i). Nothing requires Northern Valley to allow AT&T to use the transport capacity controlled by Northern Valley in order to obtain below-tariff pricing. As such, if AT&T were going to obtain a new right to demand a direct connect, that new requirement could only be imposed through notice and comment rulemaking, not through forbearance. To impose such a new requirement on CLECs, the Commission would have to explain how it could impose such an obligation in the face of contrary Congressional intent and in defiance of its prior conclusions on this issue. *See, e.g., United States Telecom Ass'n v. FCC*, 825 F.3d 674, 706-07 (D.C. Cir. 2016) ("As relevant here, '[t]he APA's requirement of reasoned decision-making ordinarily demands that an agency acknowledge and explain the reasons for a changed interpretation.'" quoting *Verizon v. FCC*, 740 F.3d 623, 636 (D.C. Cir. 2014)); *see also id.* ("An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

II. SDN'S JUNE 6, 2017, JULY 12, 2017 AND JULY 13, 2017 EX PARTES

SDN's June 6, 2017, July 12, 2017, and July 13, 2017 ex partes[7] are also misleading and omit several material facts.[8]

- **SDN Unsupported Assertion (p. 1): "SDN urged the Commission to make clear that CLECs engaged in access stimulation cannot refuse to allow direct trunking from the IXC to the CLEC's end office or to accept other solutions that result in similar outcomes."**

  - **James Valley/Northern Valley Response:** SDN's assertion is problematic in several respects. First, as discussed above, neither Congress nor the FCC's existing rules impose any duty on a CLEC to provide direct trunking services to IXCs using its facilities. On the contrary, those rules make clear that a CLEC provides functionally equivalent service when it provides tandem-switched transport. 47 U.S.C. §§ 251(a)(1); 47 C.F.R. § 61.26(a)(3)(i). Thus, SDN is simply wrong when it argues that the Commission should "make clear" that CLECs have a duty that does not currently exist in any FCC rule or the Communications Act. Imposing new obligations on CLECs is not the appropriate use of a forbearance petition.

    Second, SDN's statement is problematic because it conveniently ignores its own history – a history in which SDN has repeatedly made clear that CLECs, like Northern Valley, that are affiliates of SDN's members **must deny** an IXC's request to exchange TDM traffic through a direct connect. Indeed, just a few years ago, SDN amended its Operating Agreement in an effort to contractually bind Northern Valley to adhere to SDN's policy that prevents connected carriers from providing TDM direct connects.

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[7] The statements discussed below are specifically from SDN's June 6, 2017 ex parte, but many of the same assertions are repeated in the July 12 and 13 filings. *Petition of AT&T Services, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain Rules for Switched Access Services and Toll Free Database Dip Charges*, South Dakota Network, LLC Ex Parte Presentation, WC Docket No. 16-363 (June 6, 2017).

[8] Northern Valley and James Valley are not asking the Commission to address SDN's conduct, including the legality of its agreement with AT&T and its 2014 cost study, in this forbearance docket. As Northern Valley and James Valley explained, a forbearance docket is not the appropriate procedural mechanism for any such evaluation and, instead, the state court in South Dakota has recently issued an order indicating that it would invite the Commission's view on those issues through an amicus brief. Northern Valley's and James Valley's comments were thus focused only on responding to recent assertions made by SDN in partial support of AT&T's Petition for Forbearance, to apprise the Commission of both its prior position on these issues, and to address the context in which SDN's newly found views are being asserted.

SDN's position is a complete reversal of its long-held position that CLEC affiliates cannot provide TDM direct connects. Instead, its current argument to the Commission is a contrived revisionist's history because Northern Valley is in active litigation against both SDN and AT&T about SDN's decision to convert Northern Valley's transport circuits from Sioux Falls to Groton for the benefit of AT&T.

- **SDN Unsupported Assertion (p. 2): "SDN argued that the Commission could find that in the case of traffic that terminates to an access stimulator, a CEA provider would be required to charge a switched access rate benchmarked to the rates of the price cap LEC with the lowest interstate switched access rates in the state. For traffic terminating to LECs that are not engaged in access stimulation, a CEA provider would continue to charge its traditional tariffed switched access rate. SDN believes this proposal is in line with the Commission's pricing rules for access stimulations."**

  - **James Valley/Northern Valley Response:** SDN's position that benchmarking its tandem-switching rate for access stimulation traffic to the lowest price cap LEC is "in line with the Commission's pricing rules," is fundamentally flawed.

    SDN has been consistently required to develop its rate for tandem switching pursuant to Commission rule 61.38, meaning it is a rate-of-return carrier. Therefore, as its traffic volumes go up (which they did many years ago when several of its members and affiliates – not just Northern Valley – began delivering access stimulation traffic), then its costs get spread out over that higher volume of traffic, producing a lower per minute rate. Accordingly, as long as SDN includes all of the access stimulation traffic switched through its tandem switch, then its cost study produces a lower rate than otherwise would have occurred if SDN carried lower volumes of traffic. In other words, but for access stimulation traffic, it naturally follows that SDN's rates would have been higher.

    Because of this fact, logic dictates that, if SDN were suddenly to start charging an even lower rate for a large portion of the switched access traffic (without implementing a corresponding rate increase for its other traffic), SDN would no longer be able to generate enough revenues to cover the entire cost of providing its CEA services. Thus, SDN's position that it should charge a part of its access traffic on a rate-of-return basis and benchmark other parts of its access traffic is illogical. A rate-of-return system cannot be logically blended with a benchmarking system when the services and functionality provided by SDN is identical.

- **SDN Unsupported Assertion (p. 2): "SDN also urged the Commission to reaffirm that CEA providers may provide access service pursuant to contract and that CEA providers are not precluded from providing non-CEA services via contract."**

  - **James Valley/Northern Valley Response:** It is now public knowledge that in September 2014 SDN and AT&T entered into a secret negotiated agreement by which SDN does not charge AT&T the tariffed tandem-switching rate contained in SDN's FCC Tariff No. 1. Thus, SDN's argument that the Commission should "reaffirm" its ability to enter into off-tariff contracts for its CEA services is an effort to excuse this prior conduct. The state court in South Dakota has agreed that the legality of SDN's conduct should be addressed by the Commission through an amicus brief. As such, the Commission should decline SDN's request to use AT&T's forbearance petition as a vehicle to "reaffirm" SDN's ability to engage in conduct that has already occurred.

    While the legality of SDN's conduct is not properly addressed in this proceeding, Northern Valley and James Valley note that the actions of another CEA provider reinforce the fact that AT&T's Petition for Forbearance fails to recognize the important distinctions between the obligations of CEA providers and other LECs and, for this reason, AT&T's Petition should be denied.

    Specifically, on April 14, 2017, Iowa Network Services filed certain proposed revisions to its Tariff F.C.C. No. 1 (access tariff). The access tariff changes were originally scheduled to take effect 15 days later to achieve deemed lawful status. On April 26, 2017, INS filed another revised tariff filing indicating that, rather than the tariff changes taking effect on 15 days' notice, the effective date of the tariff revisions would be deferred for another 21 days, for a total notice period of 36 days. No other change was made to the tariff when INS deferred the effective date of the proposed tariff changes.

    INS's proposed tariff changes initially purported to tariff a new "High-Volume Traffic Contract Tariff No. 1." The rate contained in the High-Volume Traffic Contract provided access to INS's tandem switching and transport services, and the proposed rate was supported by a cost study. *See* April 14, 2017 "Description and Justification Cost Support Material" submitted in conjunction with its Revised Tariff Pages. While the High-Volume Traffic Contract purported to be offered on a "non-discriminatory" basis, in reality, the rate was made available only on traffic terminating to a handful of specific carriers. *See* April 14, 2017 Revised Tariff Pages at 1st Revised Page 146 (providing that the rate was available to Routing Exchange Carriers assigned one of the following OCN; an "OCN" or Operator Carrier Number is a unique 4 digit code that identifies a specific, FCC-licensed carrier). As the title of the "High-Volume" terminating

service suggests, the listed carriers are, like Northern Valley, known or believed to serve high-volume conferencing customers, or, as the FCC defines it, engage in "access stimulation."

On May 16th and 17th, INS filed further tariff revisions that, among other things, completely eliminated the contract-tariff terms and replaced them with a new "Volume Discount Plan" available to all long-distance carriers that meet specific conditions. Importantly, this volume discount is available on traffic terminating to *any* carrier connected to INS, rather than singling out (i.e., discriminating against) only those carriers involved in access stimulation. *See* May 16, 2017 Revised Tariff Pages at 2nd Revised Page 137 (Section 6.7.3). In order to obtain this publicly filed volume-discount rate, a long-distance carrier must meet certain volume thresholds (viz., 25 million terminating interstate minutes a month). *Id.* The customer must also agree to assist INS in reducing its costs by optimizing the use of the circuits INS dedicates to that long-distance carriers' traffic (i.e., the requirement to meet "80% or greater utilization of each trunk group"). *Id*. By agreeing to this condition, the long-distance carriers that obtain the high-volume discount will allow INS to reduce its costs; the associated savings can then be passed on to the cooperating IXCs' customers. It is Northern Valley's understanding that these modifications were made because FCC staff raised concerns about the legal viability of INS's initial tariff revisions. Notably, the volume-discount rate included in the FCC-approved INS tariff is supported by a publicly filed cost study.

The table below identifies the criteria that Northern Valley understands to be necessary for a Centralized Equal Access Provider to provide a discounted rate for its services as a dominant carrier. As the table shows, using a rate that is not cost-based, not publicly available, and that discriminates against access stimulation traffic appears to be at odds with what INS did to faithfully fulfill its duties as a FCC-sanctioned CEA provider.

INS's recent efforts to revise its CEA service tariff is the latest example of the clear, unwavering policy that CEA providers are dominant providers of CEA tandem switching and transport services, and, thus, can only provide those services pursuant to a publicly filed, non-discriminatory, FCC-approved tariff supported by a cost study as required under 47 C.F.R. § 61.28. For this reason, in addressing AT&T's Forbearance Petition the Commission should not adopt SDN's position that CEA providers can provide tandem-switching services pursuant to contract.

	INS's High-Volume Contract Tariff (as originally filed)	INS's Volume-Discount Tariff (as revised to comply with the Commission's rules)
Publicly Filed Rate	**Yes**	**Yes**
Rate Available to All Long-Distance Carriers	**Yes**	**Yes**
Rate Reduction Tied to Cost Savings for INS	**No**	**Yes** (resulting from IXC's commitment to network grooming obligations)
Rate Available for Traffic Terminating to All Interconnected Local Exchange Carriers	**No** (singled out only access stimulation LECs)	**Yes**

III. CONCLUSION

AT&T has failed to meet its burden of proof and persuasion and the Commission should deny the Petition for Forbearance in its entirety. With regard to services in rural South Dakota and other CEA states, the relief requested by AT&T would have far-reaching consequences that have not been adequately explored or developed in the record. The Commission should refuse to sanction AT&T's complete disregard for the Commission's access rules for the past four years in its practice of self-help withholding to the detriment of Northern Valley.

Sincerely,

G. David Carter